

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAVID L. DAVIS, JR.</b>	)	
Claimant	)	
VS.	)	
	)	
<b>COMER'S WRECKER SERVICES</b>	)	Docket No. 1,008,578
Respondent	)	
AND	)	
	)	
<b>INSURANCE COMPANY UNKNOWN</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant appealed the July 23, 2010, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Workers Compensation Board heard oral argument on November 3, 2010.<sup>1</sup>

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Phillip D. Greathouse of Joplin, Missouri, appeared for respondent. Blake Hudson of Fort Scott, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award.

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<sup>1</sup> Due to the retirement of Carol Foreman, E. L. Lee Kinch, of Wichita, Kansas, was appointed to serve as a Board member pro tem in this matter.

ISSUES

This is a claim for a January 14, 2001, accident. In the July 23, 2010, Award, ALJ Hursh denied claimant's request for benefits after finding claimant failed to prove his injuries arose out of and in the course of employment and failed to prove he provided a timely written claim for compensation.

Claimant requests the Board find he sustained accidental injury arising out of and in the course of his employment with respondent on or about January 14, 2001, and that timely written claim was provided. Claimant also maintains respondent's owner has no credibility in this case.

In the Award, the ALJ set out the issues addressed as injury arising out of and in the course of employment, employer-employee relationship and timely written claim. In addition to these issues, other issues listed in the Award were:

- Whether the parties are covered by the Kansas Workers Compensation Act;
- Claimant's average weekly wage on the date of accident;
- The nature and extent of claimant's impairment;
- Whether claimant is entitled to temporary total disability benefits;
- Medical bills;
- Whether claimant is entitled to future medical treatment.

The parties stipulated at oral argument to the Board that if the Board determines that claimant is entitled to an award herein, the matter should be remanded to the ALJ for a determination of the issues not yet decided at the ALJ level.

The Fund argues claimant did not make a timely written claim for compensation. The only documented written claim is dated December 30, 2002, which, according to the Fund, is well past the applicable time limit in this case, which, pursuant to K.S.A. 44-520a and K.S.A. 44-557, is one year from the date of accident. No report of accident was filed with the Director of the Division of Workers Compensation, thus creating the one-year time limit. Further, the Fund argues claimant's injury did not arise out of and in the course of employment. The Fund maintains there is some question as to whether claimant established that he was an employee of respondent. The Fund further argues that claimant has not established his accident arose out of and in the course of any employment with respondent. The Fund asserts claimant has a total lack of credibility and requests the Board affirm the ALJ's Award.

Respondent contends the ALJ correctly determined that claimant's accident did not arise out of and in the course of any alleged employment with respondent. It also argues claimant was not an employee of respondent but, rather, case law, facts and testimony

lead to the conclusion that claimant was an independent contractor. Respondent argues that even if claimant was an employee of respondent, claimant was acting outside the scope of any employment relationship with respondent at the time of the accident. Further, respondent contends the ALJ correctly determined that claimant did not make a timely written claim for workers compensation benefits. Respondent also argues a lack of credibility from claimant. Finally, should the Board enter an award in claimant's favor, respondent requests the Board find it is insolvent and assess the payment of the award against the Fund.

The issues before the Board on this appeal are:

1. Did claimant provide respondent with timely written claim?
2. Was claimant an employee of respondent on the date of accident?
3. Did claimant's accident arise out of and in the course of employment? The Board must determine whether claimant was an employee of respondent at the time of the accident. Then, if it is determined that claimant did work for respondent, the Board will have to determine whether claimant's accident arose out of and in the course of his employment with respondent.

The following issues will not be determined by the Board. If the Board determines that the ALJ's denial of benefits should be reversed, the issues listed below will be remanded to the ALJ for his determination.

4. Are the parties covered by the Kansas Workers Compensation Act?
5. What was claimant's average weekly wage on the date of accident?
6. What is the nature and extent of claimant's impairment?
7. Is claimant entitled to temporary total disability benefits?
8. Is claimant entitled to the payment of medical bills?
9. Is claimant entitled to future medical treatment?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that claimant failed to provide timely written claim in this matter and the denial of benefits by the ALJ should be affirmed.

Claimant alleges that on January 14, 2001, he was an employee of respondent, working both as a mechanic and a driver, doing towing jobs and repossession jobs. Respondent denies that claimant was an employee on January 14, 2001, and further alleges that claimant did not have permission to take a tow truck out on a repossession job on the date of accident. Thus is set the stage for what appears to be a witness credibility question.

On Sunday, January 14, 2001, claimant was driving one of respondent's tow trucks on highway 69, traveling from Weir, Kansas, to Joplin, Missouri. Claimant lost control of the truck and hit a culvert. In the truck with claimant was a friend named John Eads, who, claimant testified, was to assist claimant in the alleged repossession of a vehicle (repo) in Weir. However, the vehicle could not be located, and claimant and Mr. Eads were proceeding back to Joplin with the truck when the accident occurred. Claimant was thrown from the truck and was taken by ambulance to the hospital, having suffered fractures at C2, L2 and L3 and a cracked sternum.

The relationship between claimant and respondent, and the circumstances leading up to the accident, are clearly in dispute. Respondent's owner, Jeff Coffey, testified that he had only two full-time and two part-time employees in January 2001. Marvin Phillippi, the operations manager, also towed cars and answered the telephone. Brandon Hendrix was a full-time tow truck driver. Additionally, Kevin Crawford and Brad Coffey, the owner's brother, were hired to work part time. All employment hires were required to come through Jeff Coffey. Respondent did not have a full-time mechanic in January 2001. Claimant was hired as an independent contractor to do mechanical repairs on the truck as needed. He also would occasionally assist with towing vehicles. The extent of his towing responsibilities is contested. Claimant testified that he was used on a regular basis to tow both broken down vehicles and repos. Respondent contends that claimant was rarely allowed to operate a tow truck and then only with specific permission. Respondent contends that, on the date of accident, claimant was acting without permission. Respondent acknowledges that claimant had been working on the damaged tow truck, fixing a clutch, but no repo was scheduled nor authorized. And, while claimant alleged that the repo was authorized and that paperwork for the pickup of the vehicle was in the truck at the time of the accident, no such paperwork was ever produced in this record.

Claimant underwent significant medical treatment, with the expenses being paid by Medicaid. This Order will not discuss the medical treatment in detail as any issues dealing with the payment of medical treatment and the nature and extent of claimant's injuries will be remanded to the ALJ. What is at issue is whether claimant provided timely written claim to respondent. Under K.S.A. 44-520a, written claim is to be provided within 200 days of the date of accident, or the last payment of compensation. As respondent paid no compensation, the January 14, 2001, date of accident would be the key date. It has been stipulated that claimant submitted a Form K-WC 15, Written Claim

For Compensation, to respondent on December 30, 2002. The Form K-WC 15 is in the record, marked as respondent's exhibit 1 from the regular hearing.<sup>2</sup> Claimant also testified at the regular hearing that he had submitted a letter to respondent within six months after the date of accident. However, the alleged letter claimant discussed is not in this record. Additionally, on two occasions prior to the regular hearing, claimant testified or provided statements without raising the possibility of a letter being sent to respondent at any time before December 30, 2002. In fact, at the time of his earlier testimony, claimant denied that he had provided any such claim. Respondent denied receiving any such letter. And, claimant was unable to produce the letter or any proof that such a letter was ever sent.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>4</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>5</sup>

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .<sup>6</sup>

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<sup>2</sup> Depo. of Claimant (R.H. Testimony), Aug. 31, 2009, at 55-56.

<sup>3</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>4</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>5</sup> K.S.A. 44-501(a).

<sup>6</sup> K.S.A. 44-520a(a).

K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge:

(a) It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.<sup>7</sup>

Subsection (c) of K.S.A. 44-557 provides:

(c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident has not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.<sup>8</sup>

It has not been alleged that respondent filed an employer's report of accident in this matter. Therefore, the time limit for submitting a written claim to respondent under K.S.A. 44-520a is one year. Claimant argued at the regular hearing that he sent a letter to respondent within six months after the accident. However, claimant had earlier, while under oath and on two separate occasions, denied sending any such letter. Claimant was unable to produce a copy of this letter. Additionally, respondent denies ever receiving any such letter. The ALJ found claimant's contentions to be less than credible, and the Board agrees. The only verifiable written claim came on December 30, 2002, well after the time limit established by the statute. The determination by the ALJ that claimant failed to provide a timely written claim in this matter is affirmed. As such, the denial of benefits by the ALJ is affirmed.

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<sup>7</sup> K.S.A. 44-557(a).

<sup>8</sup> K.S.A. 44-557(c).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>9</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed and benefits denied to claimant for the accident occurring on January 14, 2001. Claimant has failed to prove that he provided timely written claim to respondent as is required by K.S.A. 44-520a.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Kenneth J. Hursh, dated July 23, 2010, denying claimant benefits in this matter, should be and is hereby affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Phillip D. Greathouse, Attorney for Respondent  
Blake Hudson, Attorney for Fund  
Kenneth J. Hursh, Administrative Law Judge

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<sup>9</sup> K.S.A. 2009 Supp. 44-555c(k).